

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH F. FEELY, JR., et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 88-0301 P
)	
RUST INTERNATIONAL,)	
)	
Defendant)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS
AND/OR FOR SUMMARY JUDGMENT

Before the court is the defendant's Motion to Dismiss and/or for Summary Judgment. Because the plaintiffs have not filed a written objection to the motion within the time provided by Local Rule 19(c), they are deemed to have waived objection to the defendant's factual assertions.¹ McDermott v. Lehman, 594 F. Supp. 1315, 1321 (D. Me. 1984). The plaintiffs' waiver notwithstanding, the court will accept as true all material facts contained in the defendant's Statement of Undisputed Facts only to the extent those facts are supported by appropriate record citations. Local Rule 19(b)(1).

¹ The court's file contains a letter from the defendant's counsel to the Clerk advising that the plaintiffs' attorney had inquired of him whether the defendant would object to an enlargement of time in which to respond to the defendant's motion and that he responded that his client would have no objection to a 30-day enlargement. Such arrangements between counsel are ineffective and do not relieve parties of their obligation to comply with the filing deadlines established by the Rules or to secure a court ordered extension.

The plaintiff Joseph F. Feely, Jr. alleges that he was injured when he fell from a ladder while working at a construction project at the Scott Paper Company mill in Hinckley, Maine as an employee of Commercial Welding Company. He asserts that the defendant was the general contractor on the project and was negligent. Underlying the defendant's motion are its material factual claims that it has had no involvement with the project and that the plaintiff has confused it with a separate and distinct corporate entity named The Rust Engineering Company. Although the defendant cites to a contract between The Rust Engineering Company and the S.D. Warren Company, a division of Scott Paper Company, and to an affidavit of Walter Browning in support of these material factual claims, the affidavit as submitted is unsigned and the contract is nowhere to be found in the record.² As a consequence, the court cannot, consistent with Local Rule 19(b)(2), credit those facts as admitted. Accordingly, I recommend that the defendant's Motion to Dismiss and/or for Summary Judgment be DENIED.

NOTICE

² Although the defendant also cites to the transcript of the deposition of the plaintiff Joseph F. Feely, Jr. in support of its Statement of Undisputed Facts, and explains that the transcript is not yet available, the defendant's supporting memorandum makes clear that the testimony of Mr. Feely on which it relies is an inconclusive statement that the only Rust employees he was aware of on the property were employees whose hats bore a "Rust Engineering" emblem. Likewise, the defendant cites to Scott Paper Company's Answers to Interrogatories, which state that at the time of his injury the plaintiff was acting in the course of his employment with Commercial Welding Company, a subcontractor of Rust Engineering Company, which was itself a subcontractor of S.D. Warren. This answer, however, does not in itself establish the defendant's claims that it was not involved with the project and that it and The Rust Engineering Company are separate and distinct entities.

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 17th day of May, 1989.

David M. Cohen
United States Magistrate